



**COLORADO
DEPARTMENT
OF PUBLIC SAFETY**

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December 1, 2010

Senator Morgan Carroll
Chair, Senate Judiciary Committee
Representative Claire Levy
Chair, House Judiciary Committee
Colorado State Capitol
Denver, CO 80203

Re: DNA Working Group: Report to House and Senate Judiciary Committees, C.R.S.
Section 24-33.5-104(3)

Dear Senator Carroll, Representative Levy, and Members of the Judiciary
Committees:

Pursuant to Section 24-33.5-104.5, CRS, the Department of Public Safety has convened a Working Group to study and make recommendations relative to DNA evidence retention issues. The Working Group met on September 13, 2010 and November 17, 2010, and has scheduled a future meeting for January 26, 2011. Due to the importance of the issues surrounding DNA collection, retention and storage, the Working Group will continue to report to the Judiciary Committees on related issues, in addition to those required in statute.

1) Implementation of "Katie's Law", SB 09-241

In its January 12, 2010 report, the DNA Working Group reported on the preparations that were underway to prepare for implementation of this legislation. On September 30, 2010, law enforcement agencies throughout the state began collecting DNA samples from individuals arrested for felony offenses. Procedures were developed by CBI in anticipation of these collections to ensure that the DNA samples are analyzed and entered into a "Felony Arrestee" database after confirmation that felony charges were actually filed. To date, CBI is attempting to determine why there are many more samples that have been taken compared to the number for which analysis is conducted based upon filing confirmation. Some preliminary explanations include that some portion of persons arrested for felony offenses are not charged with any crime or are charged with misdemeanor offenses; time periods between arrest and charging can vary based upon the type of crime involved and the local procedures (felony summonses are preferred for Class 4, 5 and 6 felonies); or delays may exist in the transmission of filing information from the courts to CBI. These issues will continue to be explored and updated information will be provided.

Bill Ritter, Jr.
GOVERNOR

Kathy E. Sasak
EXECUTIVE DIRECTOR

Colorado State
Patrol

Colorado Bureau
of Investigation

Division of
Criminal Justice

Office of Preparedness,
Security, and Fire Safety



One issue has been identified as requiring legislative consideration for 2011, and two additional issues will receive further study:

- 1) CRS Section 16-23-103 requires DNA samples to be taken from “(e)very adult arrested on or after September 30, 2010, **for a felony offense or for the investigation of a felony offense.**” (Emphasis added.) However, CRS Section 16-23-105(1)(a) addresses situations which qualify for expungement of DNA information if “a sample collected based upon the filing of a charge or based upon a final court order, each felony charge stemming from the charges has, by final court order, been dismissed, resulting in an acquittal, **or resulted in a conviction for an offense other than a felony offense described in title 18, C.R.S.**”

DISCUSSION: While most felony offenses are codified in Title 18, there are some that are found outside of this title of the statutes. For example, C.R.S. Section 42-4-1603 (2)(b) and (c) address culpability for hit and run accidents that result in serious bodily injury (Class 5 Felony) or death (Class 3 Felony). The provisions are related to the felony crimes of vehicular assault (C.R.S. Section 18-3-205) and vehicular homicide (C.R.S. Section 18-3-106). There is a clear public policy purpose in creating felony offenses for failing to stop at the scene of a serious traffic accident, so as to assist victims of the crash and to prevent drivers who cause these crashes who may be under the influence from fleeing to attempt to avoid felony liability. It does not seem appropriate to allow the person convicted under Title 42 to have his/her DNA expunged from the DNA database, while including the DNA of the person charged and convicted under the Title 18 offense.

RECOMMENDATION: Unless the felony charges are dismissed or the offender is acquitted of all felony charges, any DNA that is submitted based upon a felony arrest should remain in the DNA database. The highlighted language referencing expungement for offenses outside of Title 18 should be stricken.

- 2) C.R.S. Section 16-23-104(2) requires CBI to “file and maintain the testing results **in the state index system** after receiving confirmation from the arresting or charging agency that the adult was charged with a felony.” Currently, CBI is maintaining two separate DNA databases – one for felony arrestees and one for convicted felony offenders. In order to connect Colorado’s convicted offender database to the FBI’s CODIS (Combined DNA Index System), specific procedures must be followed.

RECOMMENDATION: Additional work needs to be done to identify appropriate procedures that will coordinate with the FBI’s requirements so that Colorado’s DNA information may be transferred without the necessity of taking and analyzing additional samples after conviction. This is a priority area for CBI.

3) Issue No. 2, above, presents the challenges that currently exist which necessitate the taking of additional samples from offenders at various stages of the case. Systems need to be identified and implemented to continue to ensure that correct information is included in databases, and that all offenders who are required to have their DNA in the databases are actually included. Once all of these procedures and processes can be reconciled, system costs (including those imposed upon offenders) can be reexamined and appropriate reductions can be proposed.

2) Report on data collected by state judicial, pursuant to C.R.S. Section 18-1-1109

When the October 1, 2010 report was submitted to the members of the judiciary committees, data that was collected pursuant to Section 18-1-1109 was not available. Since then, the following information has been identified: Two different collection forms were utilized by the courts throughout the state, one for the period of time between October, 2008 and April, 2009; and, based upon a legislative change, a different form was used for April, 2009 through June, 2010 (adding question #5). Data fields reported were:

- 1) Is the ID of the perpetrator an issue?
- 2) Does the case include Known DNA evidence?
- 3) Is it possible to perform a serology/DNA test on evidence in the case that has not previously been performed?
- 4) Does the case include reasonable and relevant evidence containing DNA that should be preserved, until further order of the court?
- 5) Does the Defendant or Attorney for the Defendant disagree with 1-4, above?

RESULTS (10/08 – 4/09)

Total # of cases	*After Hearing	*By Stipulation	#1 ID at issue?	#2 Known DNA evid?	#3 Testing?	#4 Preserve DNA?
5,778	570	5,203	936	499	1,124	251

*(On the data collection form used during the first collection period, the following question was included: "Pursuant to §18-1-1104, C.R.S., by stipulation of the parties OR after hearing, the Court makes the following findings:". These questions were not included on the form used during the latter collection period.)

RESULTS (4/09 through 6/10)

Total # of cases	#1 ID at issue?	#2 Known DNA evid?	#3 Testing?	#4 Preserve DNA?	#5 ATD disagrees?
10,536	1,264	698	2,166	286	279

In discussing these data, the DNA Working Group identified a missing data field that could provide additional information regarding the number DNA cases and the evidence that was collected and maintained. It is unknown how many cases involved destruction of evidence which was agreed upon by the parties. (It was suggested that this would be a different question than the one added in the second phase of data collection – “does the defendant or the attorney for the defendant disagree?”)

Because the data collection was ended as of 7/1/10, further analysis is not available. However, the information that was gleaned was useful in the Working Group’s discussions about current procedures and implementation of current law. This discussion will be included in Section III, below.

- 3) As required by C.R.S. Section 24-33.5-104(3)(a), the Working Group submits its current information and suggestions relative to DNA evidence retention and storage (including standardized time lines, provision of storage facilities and best practices for evidence collection and storage.)

The Working Group has concluded that there is much work yet to be done on these issues, and that the current state of the available information causes concerns that it would be premature to make firm recommendations. With these caveats, we offer the following:

1) Standardized Time Lines for Retention of Reasonable and Relevant Evidence

The current time lines are still being analyzed, and the Working Group believes that it is too soon to know whether the structure is working or is in need of revision. Further time is needed to determine whether changes are required.

2) Provision of Storage Facilities

Law enforcement agencies throughout the state are experiencing the need to expand evidence storage within their departments. The analysis of this capacity problem has suggested a number of contributing factors: the recent changes in the law requiring retention; communication gaps or delays between prosecutors and law enforcement regarding the ability to destroy specific items of evidence; a lack of resources within prosecutors’ offices to identify cases in which evidence could be destroyed/returned; a lack of resources within law enforcement agencies to identify and process evidence for destruction; philosophic concerns that evidence may have some value in the future, technology and/or laws could change, so the evidence should never be destroyed; etc. As resources dwindle, it is increasingly difficult for law enforcement agencies and prosecutors to prioritize the need to review and make determinations regarding evidence destruction. In the meantime, new items are added to the burgeoning evidence vaults. Ideas for additional resources were discussed, including searching for grant funds and utilizing interns or recruits for analyzing the evidence that could be identified for destruction.

A quick survey of the law enforcement members indicated that no one has knowledge that any police or sheriff's agency has utilized the legal provisions allowing the law enforcement agency to directly petition the court for evidence destruction. It is anticipated that through cooperation and communication, prosecutors and law enforcement should be able to identify appropriate items and process them without the need for law enforcement to go directly to the courts.

3) Statewide or Regional Storage Facilities?

The Working Group discussed the possibility of recommending either a statewide or regional storage facilities. Issues identified include:

- a) Costs and source(s) of funding for new facilities (including possible new construction or refurbishing existing structures)
- b) To store evidence in statewide or regional facilities there would be a need for standardized policies on transportation, storage, retention and access. Security and management of such facilities would also need to be provided.
- c) Due to the need to have ready access to evidence in pending cases, the suggestion from the group was any pooled storage facility (statewide or regional) would be used only for evidence in closed cases.
- d) Research will continue into how other states are storing evidence, and whether those models could be applied to Colorado.

4) Best Practices for Evidence Collection and Storage

Since the passage of House Bill 08-1397, the Colorado Association of Property and Evidence Technicians (CAPET) has been working to develop statewide guidelines on the best practices for the storage and retention of biological evidence within law enforcement. CAPET's members have seen the need to develop more standardized policies and guidelines with regard to the storage and retention of biological evidence and to better train and educate property and evidence technicians. They continue to work along with their partners at the Colorado Bureau of Investigation to develop a working guideline that will best serve the interests of the law enforcement community and the criminal justice system as a whole.

CAPET's goal is to eliminate unnecessary evidence while preserving any evidence that is crucial to the successful prosecution or exoneration of the innocent in criminal cases. CAPET is also developing a new property and evidence technician certification process, to help ensure property and evidence technicians throughout the state have the most up to date training and levels of competency available.

In addition to the association's work on these projects within the state of Colorado, CAPET's Board Chair (and DNA Working Group participant), Dennis Davenport (Commerce City Police Department), has been selected by the National Institute of

Justice and the National Institute of Standards and Technology to develop a similar guideline on a national level. The Technical Working Group on Biological Evidence Preservation has developed the charge to ensure the integrity, prevent the loss, and reduce the premature destruction of biological evidence after collection through post-conviction proceedings. The NIST/NIJ group intends to accomplish this charge by taking the following steps:

- a) Address legislative issues regarding:
 - i. Crime categories/time periods where storage is mandated
 - ii. Guidance in rule-making and legislation
 - iii. Mandatory training
 - iv. The creation of task forces at state/local level
- b) Establish a clearinghouse of resources related to collection of biological evidence containing:
 - i. Recommendations on how resources can be updated based on gap analysis of current publications
- c) Provide best practices for the preservation and disposition of biological evidence
- d) Improve existing training programs through:
 - i. Evaluation of existing training programs
 - ii. Recommendations on content and best practices in training based on a gap analysis
- e) Increase the awareness of existing and new technologies/methods for storage and tracking of evidence
- f) Address inter-agency communication issues through:
 - i. Analysis of information flow processes (cross-jurisdictional, within agencies)
 - ii. Analysis of process of disposition of evidence
- g) Recommend and identify dedicated funding streams such as:
 - i. Cold Case, Byrne, Efficiency, Coverdell, Post-conviction grant programs
- h) Communicate to relevant stakeholders via:
 - i. Standard presentation/talking points
 - ii. Survey of law enforcement agencies by group or external entity

The NIST/NIJ technical working group is scheduled to complete this work by January 2012. Dennis Davenport's significant involvement in this national effort will enhance Colorado's understanding of the issues. Mr. Davenport will be able to bring the significant knowledge he gains back to Colorado to help find solutions to the challenges and problems we face in our justice system.

The DNA Working Group will continue its efforts to identify and analyze the various problems and challenges, along with proposals for solutions. The meeting minutes, Working Group membership, and historic documents related these issues can be found on the web at <http://cdpsweb.state.co.us/DNA>.

Respectfully submitted this 1st day of December, 2010.

A handwritten signature in cursive script, appearing to read "Kathy E. Sasak".

Kathy E. Sasak
Executive Director